STATE OF MICHIGAN

COURT OF APPEALS

CHARLES A. KWILINSKI,

Plaintiff-Appellee,

v

MARY ELLEN KWILINSKI, a/k/a MARY ELLEN FERRO,

Defendant-Appellant.

UNPUBLISHED
January 7, 2000

No. 218689
Eaton Circuit Court
LC No. 91-000130 DM

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

McDONALD, J. (*concurring in part and dissenting in part*).

I agree with the majority opinion holding that the trial court did not err when it proceeded to consider the best interest factors. I also agree with the trial court when it found an established custodial environment existed and any change in custody must be shown by clear an convincing evidence.

I disagree with the majority opinion's finding that plaintiff presented clear and convincing evidence showing a change in custody was in the child's best interest.

In the present case, although the parties did not object to the admission of the friend of the court report and recommendation, the trail court in its opinion explicitly adopted the friend of the court's (FOC) recommendation. Moreover, the court provided, at best, cursory findings regarding the best interest factors and did not provide any reasoning or discussion in support of its findings. This results in the appearance at least, that the trial court failed to make a decision regarding custody on a basis independent of the FOC report and recommendation. MCL 552.507(5); MSA 25.176(7)(5) requires the circuit court, on motion of any party dissatisfied with a recommendation of the FOC, to conduct a hearing as if no FOC hearing bad been conducted previously and arrive at an independent conclusion. *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 251 (1986).

The trial court found plaintiff and defendant to be equal with regard to best interests factors (a)-(g), (i), and (l). Plaintiff was favored as to factor (h) and defendant was favored with regard to factor (j). The trial court found factor (k) to not be relevant in this case. I conclude that the trial court's findings as to factors (c), (e), (f), and (g) were against the great weight of the evidence presented at the custody hearing and thus the trial court abused its discretion in changing the custody of the minor child.

The trial court determined that the parties were equal with regard to factor (c), the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care. This finding was against the great weight of the evidence. The record contained evidence that defendant had the minor child tested for diagnosis of attention deficit disorder, that she had hired a tutor for him, participated in counseling for another child, and sought medical treatment for yet another child. Although evidence indicated that plaintiff was employed and owned a house, there was no evidence that demonstrated his capacity and disposition to provide the minor child with food, clothing and medical care.

With regard to factor (e), the permanence, as a family unit, of the existing or proposed custodial home or homes, the trial court found the parties equal. However, the record favors defendant regarding this factor. She was in a stable marriage and interacted with not only her husband, but with all her children. Plaintiff, however, was in a live-in relationship with his girlfriend and had no interaction with two of the parties' other children; thus, the minor child would have little, if any, contact with them if plaintiff were awarded custody. The trial court's finding regarding this factor was against the great weight of the evidence.

The trial court determined that both parties were morally fit under factor (f). The moral fitness considerations of factor (f) relate to a person's fitness as a parent and the effect that the conduct at issue will have on the parent-child relationship. *Fletcher, supra* at 886-887. Verbal abuse and other offensive behavior may be considered under factor (f). *Id.* at 887, n 6. Testimony was provided that plaintiff made obscene gestures at defendant and called her names. Although this was denied by plaintiff, he admitted to calling defendant "you bitch" in front of the children. In fact, the reason the parties' other minor son no longer visited plaintiff was because of plaintiff's derogatory remarks concerning defendant. The trial court's finding regarding this factor was against the great weight of the evidence.

With regard to factor (g), the mental and physical health of the parties involved, the trial court determined that both parties were in sound mental and physical health. However, I conclude that plaintiff's abiding anger toward defendant was not resolved and that it affected his relationship with his children. Plaintiff admitted that the resentment he had for defendant was a contributing factor to some of the problems experienced by the children. Plaintiff's comment that "I want to go to a psychiatrist to try to break me of some of those things . . . I need help bad there" was indicative of a need to control his anger toward defendant. Outbursts against the other parent and the effect of that type of conduct on the parent-child relationship is relevant with regard to factor (g). *Fletcher, supra* at 887; *Bowers v Bowers*, 198 Mich App 320, 332; 497 NW2d 602 (1993). The record demonstrates that the trial court's finding regarding this factor was against the great weight of the evidence.

I would note that on remand the trial court would be free to simply modify the parenting time without changing actual custody. A trial court need not change joint custody to sole custody merely because some problem exists. See e.g., *Nielson v Nielson*, 163 Mich App 430; 415 NW2d 6 (1987).

I would reverse and remand for a new hearing and not retain jurisdiction.

/s/ Gary R. McDonald